case of a noise or stench, common to a neighborhood: *Davison* v. *Isham*, 9 N. J. Eq. (1 Stock.) 186; *Catlen* v. *Valentine*, 9 Paige 575. But where the injury is not common to all, as where it consists in part of vibration produced by machinery, which affects the buildings of some of the complainants, and not those of the rest of them, there is a misjoinder of parties: *Davison* v. *Isham*, *supra*.

SEYMOUR D. THOMPSON.

St. Louis, Mo.

RECENT AMERICAN DECISIONS.

Supreme Court of Iowa.

YAHN *v.* CITY OF OTTUMWA.

The rule that a witness not an expert cannot testify as to his opinion is not of universal application. Under certain circumstances such a witness may state his observation as to cause and effect.

Thus where the question was as to the discharge of water from a hose and its effect upon a team of horses, a witness may state not only that the water was discharged, but that in his opinion it was this that frightened the horses.

Where an obstruction in the street is in plain view of the driver of a vehicle, and he drives against it, he is guilty of contributory negligence, and it is no answer to this to say that his attention was taken up with looking above the ground to direct his team.

APPEAL from Wapello District Court.

This action was brought to recover damages for an injury received by the plaintiff by being thrown from a wagon in one of the streets of Ottumwa, the accident having been occasioned, as it is alleged, by reason of one of the wheels of the wagon coming in contact with a stone which the city authorities had negligently allowed to remain upon the street. The pleadings are in the usual form of actions of this character, and a trial to a jury resulted in a verdict and judgment for the plaintiff. Defendant appeals.

Wm. McNutt and *W. D. Tisdale*, for appellant.

W. H. C. Jacques, *S. E. Alder* and *Stiles & Beaman*, for appellee.

The opinion of the court was delivered by

ROTHROCK, J.—1. The plaintiff and her husband, who is a farmer, reside in the vicinity of Ottumwa. On the morning of the day the injury was received they went to Ottumwa, in an ordinary

farm wagon, drawn by two horses, to sell some potatoes and purchase some family supplies. After selling the potatoes the plaintiff went to another part of the city on an errand, and the husband drove the wagon down along the edge of Jefferson street and left it standing there awaiting plaintiff s return. When she returned they put some chairs, which they had purchased, in the wagon, and the plaintiff seated herself upon one of the chairs. Her husband took his seat upon a board laid across the wagon box and started the team. The wagon had moved but a few feet when the plaintiff fell to the street, and by reason of the fall her arm was broken.

It was claimed upon the trial that the fall of the plaintiff was caused by one of the wheels of the wagon coming in contact with a stone in the street, in a violent and sudden manner, by which the wagon careened or tipped to one side. There was a great variance in the testimony of the witnesses for the plaintiff, as to the size of the stone and its exact location in the street. It was claimed, upon the part of the city, that there was no stone in the street, and that the wagon wheel did not run against a stone, but that the accident was caused by a sudden start of the team from fright, the wagon being partly in the gutter at the side of the street, and not upon level ground, and for the further reason that the plaintiff was in an unsafe and dangerous position, being seated in the wagon upon an unfastened chair.

It is by no means clear from the evidence that there was a stone in the street, such as is described by the plaintiff's witnesses. The witnesses for the defendants, some of whom were in position to know whereof they testified, stated that no such stone was in the street at the time of the accident. Upon this question of fact the court would not have been justified in interfering with a verdict for either of the parties.

This being the state of the case, it was a most material question whether or not there was any other cause to which the accident was properly attributable than the contact with the stone on the street. Mrs. E. Ulrich was called as a witness for the defendant. She testified that she was sitting at an upper window, in a building near where the accident occurred, with nothing to obstruct her view of the wagon and the street where it stood. She further testified as follows: "I saw the woman coming across Main street from Hill's grocery; she had some chairs and packages in her arms; she put the chairs in the wagon and got in; she sat on a

chair, back of the seat in the wagon. When the horses started to go off she fell out. The horses started quick—kind of jumped. I thought I saw a man standing there sprinkling the street with a hose; he was standing on the sidewalk, at the edge of the building, sprinkling down the sidewalk towards the alley; he was sprinkling water near the team, all around them; he commenced sprinkling just a little before the accident happened. She fell out at the same time the horses jumped. The horses in starting gave a quick motion. She fell out right over the sidewalk. Some packages she had in her arms fell out with her. The chair did not fall out."

Question. "Now I would like to have you state what it was that made the horses jump." Objected to by the plaintiff because incompetent, and it calls for a conclusion of the witness. The objection was sustained by the court, and the defendant duly excepted to the ruling at the time.

Mrs. McGuire, another witness, stated that she was at the window with Mrs. Ulrich, and after describing the position of the wagon and the plaintiff's position therein, she was asked this question: "You can describe, after she got in and sat down on the chair, how the accident occurred, as you now remember it. Give it in your own way—after she sat down." *Answer.* "There was some one standing at those steps near the door sprinkling the streets with a hose, and the water flew over the horses and around them, and they got frightened and jumped." Objection was made to "what the witness said about the horses becoming frightened, because it is incompetent, being an opinion of the witness." The objection was sustained. We think these rulings of the court were erroneous. It is true that the dividing line between what is a fact and what is an opinion, is not and cannot be very clearly defined; but it surely is competent for a witness to state whether horses were frightened by a stream of water thrown upon or around them, or by the escape of steam from an engine, or by being set upon by a dog, or the like.

The observation of the witness as to cause and effect is a fact which he may state to the jury. Upon a question like this, the discharge of the water from the hose and its effect upon the horses appears to us to be a compound of fact and opinion. To hold that it is incompetent would limit and hamper the introduction of evidence in a manner not contemplated by any rule of law of which

we have any knowledge. If it be the law that a witness, not an expert, may not, under any circumstances, give an opinion, the statement of these witnesses that the horses were frightened would not be admissible. But the rule is not thus to be applied. It is competent for a witness to testify to his conclusion when the matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time. It appears to us that the subject-matter—the alleged fright of the horses, in this case—was of the character just described. A witness may see a team frightened and may state the fact that water was thrown from a hose upon or near the team, and he may describe how and when it was thrown, and yet he cannot put the jury in his place in regard to the facts without stating his conclusion as to the effect of the throwing of the water.

A witness may state his opinion in regard to sounds—their character, from what they proceed, and the direction from which they seem to come (*State* v. *Shinborn*, 46 N. H. 497); the correspondence between boot and foot prints (*Com.* v. *Pope*, 103 Mass. 440); and it is competent for a witness not an expert to testify to the condition of health of a person, and that he is ill or disabled, or has a fever, or is destitute (*Barker* v. *Coleman*, 34 Ala. 221; *Wilkinson* v. *Moseley*, 30 Id. 562). A witness may give his judgment whether a person was intoxicated at a given time: *People* v. *Eastwood*, 14 N. Y. 562; *State* v. *Huxford*, 47 Ia. 16.

2. The plaintiff and her husband both testified that the horses were old and gentle, and they were not at all frightened. It is pretty clearly established by the evidence that if there was a stone in the street it was in plain view of the husband of the plaintiff when he took his seat in the wagon and started the horses. The court did not directly charge the jury that if the stone was in full view of the plaintiff's husband he should have seen and avoided it. The charge directs the jury that the driver was chargeable with ordinary care and prudence in driving the team. It was not claimed that the husband's attention was in any manner diverted from properly driving the team after he took his seat in the wagon. The accident happened in broad daylight. Now, if the stone was in full view of the husband when he started the team, it was his plain duty to have seen and avoided it. The defendant requested the court to instruct the jury that "it was the duty of the plaintiff's husband to use care in driving, and to look where he was driving,

and to avoid all obstacles which were dangerous in their character, and which were plainly visible and not obscured, and if he failed to do so, and the plaintiff was thereby injured, then she cannot recover."

This instruction was refused. We think this or some other explicit instruction applicable to this view of the facts of the case should have been given. Where an obstruction is in the street in plain view of the driver of a vehicle, and his attention is in no manner diverted so as to excuse him for not seeing the obstruction, and he drives against it or into it, he is clearly guilty of contributing proximately to any injury which may result: *Tuffree* v. *State Centre*, 11 N. W. Rep. 1. It is no answer to this measure of diligence and care to argue that the driver's attention was taken up with looking above the ground to direct his team. Human vision is not so narrow that the driver of a team may not take in the whole of his surroundings, including the team and every obstruction which may be in the line of the wheels of his vehicle.

In our opinion the jury should have been expressly instructed that if, when the team was started by the driver, the stone (if there was one) was in plain view, and there was nothing to divert his attention from seeing it, that it was his duty to have seen and avoided it, and, if he did not do so, the plaintiff could not recover.

Reversed.

As a general rule, witnesses must testify only to the facts which they have witnessed, and not to the opinions which they may have formed on those facts. The exceptions to this rule are not many. Perhaps the most important of these exceptions is found in that portion of the law of evidence which permits the opinions of experts to be heard on the trial. Such opinions, however, are admissible only on questions of science or skill, or relating to some art or trade, and such witnesses must have special skill, either through study or experience, which will enable them to answer questions which the jury, uninstructed in such matters, would be unable to answer. The rules relating to the admissibility of such a kind of evidence do not fall within the purpose of this note, which will be restricted to a consideration of the relevancy and competency of the opinions of ordinary witnesses: that is to say, persons not professing special skill on the subject, and therefore not properly falling within the definition of "experts."

In *Clifford* v. *Richardson*, 18 Vt. 626, ROYCE, J., in speaking on this subject, said: "The general rule certainly is that witnesses are to testify to facts, and not to give their individual opinions. This rule, however, has its exceptions, some of which are as familiar and as well settled as the rule itself. When all the pertinent facts can be sufficiently detailed and described, and when the triers are supposed to be able to form correct conclusions without the aid of opinion or judgment from others, no exception to the rule is allowed. But cases occur where the affirmative of these propositions cannot be assumed. The facts are some-

times incapable of being presented with their proper force and significancy to any but the observer himself. And it often happens that the triers are not qualified from experience in the ordinary affairs of life duly to appreciate all the material facts when proved. Under these circumstances, the opinions of witnesses must of necessity be received." It will be observed that the judge here refers to the opinions of experts on questions of science or skill where he speaks of cases where the triers are "not qualified from experience in the ordinary affairs of life," to pass upon certain facts before them. But in the second class, viz., where the facts are "incapable of being presented with their proper force and significancy to any but the observer himself," the opinions of persons not experts are referred to. Such evidence is generally said, and properly too, to be admitted from necessity. In many cases it is impossible to separate a description of certain things which have taken place in the presence of the witness, from an opinion upon them. In other cases it would be impossible to convey the information to the minds of the jury without the expression of an opinion.

The most common class of cases in which the opinion of a non-expert is permitted is that where questions of time, quantity, number, dimension, height, speed, distance, or the like, are at issue. In *Stewart* v. *State*, 19 Ohio St. 302, the prisoner was indicted for killing D., and the question arose whether or not the killing arose out of a sudden quarrel. A spectator, who was called as a witness, was asked whether the prisoner had time enough to get out of the way of deceased, and his answer was held admissible. "It is true, as a general rule," said the court, "that the opinion of a witness cannot be given, the witness relating the facts from which the jury form their opinion. This rule, however, is not universal. The fact here sought to be proved, to wit, that the defendant could not avoid the conflict, could not be well proved to the jury by a statement of facts, the time occupied by the deceased in passing from where he stood to the defendant, a distance of only a few feet, could hardly be stated with any accuracy of measurement. The rapidity of his motion could not be calculated so as to convey any very definite idea of his velocity. The particular position of the defendant, in reference to surrounding objects, as well as the position of his body at the time, were important items in determining the fact whether he could have got out of the way or not, and yet it would be very difficult, perhaps impossible, to convey any very clear idea to the jury in reference to these matters. A variety of circumstances that could only be perceived, but not detailed, would constitute the aggregate from which the opinion would be formed. The person who had witnessed the transaction could alone, most probably, form any idea on the subject that could be relied on with safety."

In *State* v. *Folwell*, 14 Kans. 105, on the trial for the larceny of a horse, the fact that the prisoner's wagon had made certain tracks was relevant. A witness, who had examined the wagon, observed its peculiarities, and measured the width of the wheels, was allowed to testify that, in his opinion, the prisoner's wagon had made the track. "It is true," said the court, "that, as a general rule, witnesses are not allowed to give their opinions to a jury; but there are exceptions. In many cases they are the best evidence of which the nature of the case will admit, cases where nothing more than an opinion can be obtained. Duration, distance, dimension, velocity, &c., are often to be proved only by the opinion of witnesses, depending, as they do, on many minute circumstances which cannot fully be detailed by witnesses." In a Vermont case, tried in 1867, the question arose whether one T. lived in the town of J. in the year 1829. A witness sixty-

four years old, who had been acquainted with T., was asked: "From your opportunities of knowing, as you have stated them, do you think it possible for T. to have lived in J. that year and you not have known it?" and the witness was allowed to answer: "I should not think it was." On appeal, this was held proper. Said the court, "Where the witness has had the means of personal observation, and the facts and circumstances which lead the mind of a witness to a conclusion are incapable of being detailed and described so as to enable anyone but the observer himself to form an intelligent conclusion from them, the witness is often allowed to add his opinion or the conclusion of his own mind. Such is the case in questions of identity of persons and things, handwriting, the value of property, questions of insanity, time and distance, &c., and various other instances that might be referred to. It would be so difficult for the witness to detail and describe all the facts and circumstances in their full force which go to make up his knowledge of that T. lived in H. and not in J. that season, as to bring this question and answer within the exception, and not within the rule that excludes opinions of witnesses, if it can be regarded as an opinion in the legal sense of the rule. It is rather a mode of expressing the degree of confidence the witness has in the fact he affirmed as to the place of the residence of T. during the time in question. It is like the case where two witnesses are present at a conversation with a third person, and one witness testified that a particular thing was said, and the other is called and testified that he was present all the time and heard no such thing said. In such case, it is always allowable for the latter witness to state whether, if any such thing had been said, he thinks he should have heard it." In another Vermont case, an action being brought for injuries received on a highway, it appeared that there were several holes and gullies in the road, which had been made by water. The opinion of a person who had examined them as to whether they were of recent date, was admitted. "Where the facts," said the court, "are of such a character as to be incapable of being presented with their proper force to anyone but the observer himself, so as to enable the trier sto draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who had the benefit of personal observation, he is allowed, to a certain extent, to add his conclusive judgmeut or opinion:" *Bates* v. *Town of Sharon*, 45 Vt. 474. So the question being the speed as to which a railroad train was going at a certain time, the opinions of ordinary witnesses have been admitted: *Detroit, &c., Railroad Co.* v. *Van Steinburg*, 17 Mich. 99; *Grand Rapids, &c., Railroad Co.* v. *Huntley*, 38 Mich. 537; *Salter* v. *Utica, &c., Railroad Co.*, 59 N. Y. 631; *Pennsylvania Co.* v. *Conlan*, 101 Ill. 94. But where the question was the capacity of an engine to draw a train, the opinion of an ordinary witness was rejected: *Sisson* v. *Cleveland, &c., Railroad Co.*, 14 Mich. 497. These last cases illustrate the distinction we have referred to. In *Sisson's case* the question was one which none but an expert could be supposed to have the capacity to answer; while, in the former cases, as well said, "the point to which the attention of the witnesses was directed was the speed of a passing object. The motion of the train was to be compared to the motion of any other moving thing, with a view to obtaining the judgment of the witness as to its velocity. No question of science was involved beyond what would have been had the passing object been a man or a horse. It was not, therefore, a question for experts. Any intelligent man who had been accustomed to observe moving objects would be able to express an opinion of some value upon it the first time he ever saw a train in motion. The

opinion might not be so accurate and reliable as that of one who had been accustomed to observe, with timepiece in hand, the motion of an object of such size and momentum; but this would only go to the weight of the testimony, and not to its admissibility. Any man possessing a knowledge of time and of distances would be competent to express an opinion on the subject."

Other illustrations of the competency of opinion evidence appears in the following rulings: On an indictment for murder, the opinion of a witness as to the time of day the prisoner left a certain place, and as to the time which elapsed before his return, was admitted: *Campbell* v. *State*, 23 Ala. 44. So where the question was whether a ballot-box had been tampered with, the opinion of a witness who had seen it was admitted: *McIntosh* v. *Livingston*, 41 Iowa 219. So in an action for an injury on a highway, the question being whether it was wide enough to permit two wagons to pass each other, the opinion of a witness who had examined it was admitted: *Fulsome* v. *Tsp. of Concord*, 46 Vt. 135. And see *Kearney* v. *Farrell*, 28 Conn. 319; *France* v. *McElhone*, 1 Lans. 17; *Evans* v. *People*, 12 Mich. 27; *Couch* v. *Watson Coal Co.*, 46 Iowa 7; *Beatty* v. *Gilmore*, 16 Penn. St. 463; *Cook* v. *Parham*, 24 Ala. 21.

A second class of cases where opinions are admissible in evidence is where a person's manner, habit or conduct or his physical or mental condition or appearance are to be proved. In *Tobin* v. *Shaw*, 45 Me. 331, A. sued B. for breach of promise of marriage. The opinion of a witness that after B. ceased visiting A. the latter appeared sober and melancholy was admitted. Said the court: "Certain affections of the mind, such as joy and grief, hope and despondency, are often made known to an intimate acquaintance without any verbal communications, by the general appearance and conduct of the party, with entire certainty, when the facts on which conviction is founded in the mind of an acquaintance cannot be fully disclosed in language so as to be understood by a stranger." *McKee* v. *Nelson*, 4 Cow. 355, decided in New York in 1825, is generally regarded as the leading case on this part of the subject. The action was for breach of promise of marriage, and on the trial witnesses were allowed to testify that in their opinion the plaintiff was sincerely attached to the defendant. On appeal, this ruling was affirmed. "We do not see," said the court, "how the various facts, upon which an opinion of the plaintiff's attachment must be grounded, are capable of specification, so as to leave it like ordinary facts as a matter of inference to the jury. It is true, as a general rule, that witnesses are not allowed to give their opinions to a jury; but there are exceptions, and we think this is one of them. There are a thousand nameless things indicating the existence and degree of a tender passion which language cannot specify. The opinion of witnesses on this subject must be derived from a series of instances passing under their observation, which yet they never could detail to a jury." Although this case has been criticised in Pennsylvania (*Leckey* v. *Bloser*, 24 Penn St. 401), and similar evidence was rejected in Indiana, in an early case, without any examination by the court of the question on principle, the rulings of the New York court appears perfectly correct, and has been cited and approved in many subsequent cases in that and other states. An earlier English case, not generally noticed in the decision of such questions, is that of *Trelawney* v. *Colman*, 2 Stark. 168. This was an action for criminal conversation. It appeared that during the plaintiff's absence from home his wife had been visiting a friend, and another visitor there was produced as a witness and asked his opinion as to her affection for her husband during her stay there. HOLROYD, J., ruled that the

judgment which the witness had formed from the anxiety which the wife had expressed concerning her husband, and from her mode of speaking of him during her absence from him, was proper evidence. *Lewis* v. *State*, 49 Ala. 1, is another instance of this kind. On a trial for murder a witness testifying concerning the struggle between the deceased and the prisoner deposed that the former was trying to get away from the prisoner. This was held competent. "It was clearly not a mere opinion," said the court, "but a fact derived from the observation of the witness, which it was competent for him to state; but if regarded rather as an opinion, than a fact accurately speaking, it is such character of opinion as may be stated by a person who witnessed a conflict. A witness is competent from observation to state whether a person appears to be sick or well at a particular time; and why may not a witness, who sees a struggle between parties, state whether one was trying to get away and the other was trying to prevent his escape.

So in *Brownell* v. *People*, 38 Mich. 732, the prisoner being indicted for killing a person in an affray, the opinions of spectators that he appeared to be in fear at the time, were admitted. Said the court, "the manner in which an act is done—whether rude and offensive or kind and pleasant—is a matter of fact open to the observation of the senses to which a witness may legally testify. Words are nothing except in connection with the intention with which they are used or taken. The *animus* of a look or other expression of countenance is as perceptible to the eye as words to the ear, and often much more capable of correct understanding. That this is so is self-evident.

In *Polk* v. *State*, 62 Ala. 237, the question arose whether there was any ill feeling between the defendant and another at a certain time. The opinion of one M. on this point was rejected. On appeal this was held error. "Enmity or ill-feeling between parties," said the court, "is a fact to which a witness may testify if he knows it. It is generally made manifest by the demeanor and conversation of the parties, and third persons observant of and familiar with their intercourse, and the state of their feelings as shown by their conduct and conversation may testify to it as a fact. It stands in the category of health, sickness, good-humor, anger, earnestness, jest."

In a New York case B. being indicted for the murder of M. during a struggle between them, a witness was asked whether the hold of the prisoner and M. was a friendly or unfriendly grasp. His answer, that he thought it was a friendly grasp, was received: *Blake* v. *People*, 73 N. Y. 586. So, in an action to recover wages the opinion of a witness that the plaintiff seemed to acquiesce in a proposal made to him (*Bradley* v. *Salmon Falls Mfg. Co.*, 30 N. H. 487); on a trial for larceny the opinion of a witness that when the prisoner made a certain statement he did so in jest (*Ray* v. *State*, 50 Ala. 104); in an action for trespass the opinion of a witness that the property was seized in an offensive and insulting manner (*Raisler* v. *Springer*, 38 Ala. 703); on a trial for murder the opinions of witnesses that the prisoner's manner in answering a question was "short" (*Carroll* v. *State*, 23 Ala. 28); in an action for negligence the opinions of witnesses that the defendant's servants were careful, temperate and attentive (*Gahagan* v. *Boston, &c., Railroad Co.*, 1 Allen 197); in an action against a county for medical services, the opinion of a witness that the patient was in such destitute condition as to demand public charity and prompt attention (*Autauga Co.* v. *Davis*, 32 Ala. 703); the question being whether there was any ill-feeling between two parties at a certain time, the opinions of witnesses on this point (*Polk* v. *State*, 62 Ala. 237); on a prosecution

under the liquor laws the opinions of witnesses that a certain party was a person of intemperate habits (*Smith* v. *State*, 55 Ala. 1; *Stanley* v. *State*, 26 Id. 26; *Tatum* v. *State*, 63 Id. 150); the validity of a sale alleged to have been made to defraud creditors being disputed, the opinions of witnesses that there seemed to be a difference in the appearance and management of the property after the sale (*Gallagher* v. *Williamson*, 23 Cal. 331)—were all admitted in evidence. And see *Engles* v. *Marshall*, 19 Cal. 320; *Chaires* v. *Brady*, 10 Fla. 133; *Snow* v. *Grace*, 29 Ark. 138; *Bryan* v. *Walton*, 20 Ga. 480; *Whittier* v. *Tsp. of Franklin*, 46 N. H. 23.

So, health, sickness and disease alleged to exist at a certain time are provable by opinion, as that a person "appeared healthy," *Brown* v. *Lester*, Ga. Dec. 77, or "appeared sick," *Wilkinson* v. *Moseley*, 30 Ala. 562, or "looked bad," or "was suffering," *South, &c., Railroad Co.* v. *McLendon*, 63 Ala. 266, or that his appearance indicated bad health, *Rogers* v. *Crain*, 30 Tex. 224. And see *State* v. *Knapp*, 45 N. H. 148, where the opinions of witnesses were admitted that a woman's health had not been near so good since a certain time as before. In *Irish* v. *Smith*, 8 S. & R. 573, on a trial of a contested will, a witness testified that the testator would look at him with a vacant stare and "his countenance and appearance indicated childishness." "The countenance," said the court, "gives strong indications of the state of the mind. What the countenance is, is matter of fact, depending, to be sure, in some measure, on opinion. All men would not form the same opinion of the same countenance. One might think it indicated childishness, another not. But that is no reason the evidence should be excluded. The jury, in such cases, must depend something on the intelligence displayed by the witnesses, in the course of their examination. Physicians are not the only persons capable of judging of the countenance. A simple idiot no man could mistake; nor would there be much difficulty in perceiving very great weakness of intellect short of pure idiocy."

In *Chicago, &c., Railroad Co.* v. *George*, an action was brought against a railroad company for a personal injury. The opinion of an ordinary witness that the plaintiff required medical attendance for a certain time was held competent. Said the court, "in a question of this kind any person of intelligence is capable of judging of the necessity of medical advice and services. It is universally acted upon by all classes of mankind, and we are not disposed to lay down a rule that none but a physician is competent to prove that a person is sick or so sick as to require medical advice. When it comes to determine the nature or the effects of disease, it is different. These are scientific questions that none but those skilled in the science are competent to determine. And as well said by CAMPBELL, J., in *Elliott* v. *Van Buren*, 33 Mich. 49, "There is no rule which can prevent ordinary witnesses from describing what they see or from testifying concerning the kind of injury or sickness of others whom they have had occasion to consort with, unless it is something out of the common course of general information and experience, or unless the question presented involves medical knowledge beyond that of ordinary unprofessional persons. It would be ridiculous to shut out testimony of what any juryman would understand well enough for all the exigencies of the case before him, simply because no physician had seen or examined the party. It would lead to a denial of justice in all cases of bodily injuries and sickness which did not occur within range of medical help, and which were not regarded as so difficult of treatment as to demand it. There is no danger that the introduction of common testimony on matters of common knowledge will do any more mischief when open to cross-examination

before a court and jury, than would arise from the want of any legal means of selecting witnesses from the numerous class of professional men who differ as much in their relative merits as many of them do from laymen."

Age also is provable by opinion. For example, on an indictment for selling liquor to a minor the opinion of a witness that the minor's appearance was calculated to produce the belief that he had attained his majority is competent: *Marshall* v. *State*, 49 Ala. 21. And the plea of infancy being set up to an action on a contract, the opinions of witnesses that from his appearance they should take the defendant to have been of legal age at the time, are relevant: *Morse* v. *State*, 6 Conn. 9; *Benson* v. *McFadden*, 50 Ind. 431.

Drunkenness alleged to exist in a person at a certain time is provable by opinion. In *Dimick* v. *Downs*, 82 Ill. 570, in an action for assault and battery it was contended that the plaintiff was intoxicated. The opinion of a witness to this effect was admitted. "Whether a person," said the court, "is nervous and excited or calm, or whether drunk or sober, are facts patent to the observation of all, and their comprehension requires no peculiar scientific knowledge. In *Choice* v. *State*, 31 Ga. 424, on a trial for murder the opinions of witnesses that when they saw the prisoner, shortly after the crime, "he appeared to be drinking" were received. Said the court, "It would seem rather captious to object to the statements of the witnesses that the prisoner appeared to be drinking. Such expressions, both in ordinary life and in the courts, convey to the mind with sufficient certainty, the condition of a person, so as to enable one to pronounce a decision therein with reasonable assurance of the truth. Really no other rule is practicable; if the witness must be confined to a simple narration of facts, how the person leered or grinned, how he winked his eyes or squinted, how he wagged his head, &c., all of which drunken men do, you shut out not only the ordinary, but the best mode of obtaining truth."

In an Illinois case (*City of Aurora* v. *Hillman*, 90 Ill. 66) it was said: "Intoxication or drunkenness are facts which may be proven as other facts are proven. A witness by observation and by the exercise of his perceptive faculties, his five senses, can learn and know facts, and such facts he may state. He would not be confined to a detail of the combination of minute appearances that have enabled him to ascertain the facts of intoxication. The details of conduct, attitude, gesture, words, tone and expression of eye and face may be stated by him, or he may state the fact of intoxication, a fact which he can ascertain by personal observation, as he ascertains other facts. So also a witness may state whether or not a person had the appearance of being intoxicated, and such statement of appearance would be the statement of a fact. Facts which are latent in themselves and only discoverable by way of appearances, more or less symptomatic of the existence of the main fact, may from their very nature be shown by the opinions of witnesses as to the existence of such appearances or symptoms. Sanity, intoxication, the state of health or of the affections, are facts of this character. And see *People* v. *Eastwood*, 14 N. Y. 562; *State* v. *Pike*, 49 N. H. 407; *State* v. *Huxford*, 47 Iowa 16; *Castner* v. *Sliker*, 33 N. J. L. 96; *Pierce* v. *State*, 53 Ga. 365; *Pierce* v. *Pierce*, 38 Mich. 412.

But by far the largest class of cases in which evidence of opinion has been received is that where the sanity or insanity of a person is at issue. As a general and well-founded rule persons not medical men cannot give their opinions as to the existence, nature or extent of disease. An exception to this rule was early made in the case of subscribing witnesses to a will who are allowed to be called upon for their opinions as to the sanity of the

testator at the time they executed it. Afterwards, this exception was extended and the rule established in England that one not an expert may give an opinion founded upon observation that a certain person is sane or insane. This rule is now adopted in the courts of all the states except those of Massachusetts, Maine, New Hampshire and Texas: *Morse* v. *Crawford*, 17 Vt. 502; *Clifford* v. *Richardson*, 18 Vt. 620; *Crane* v. *Northfield*, 33 Id. 124; *Dunham's Appeal*, 27 Conn. 192; *Clark* v. *Fisher*, 1 Paige 171; *Sears* v. *Shafer*, 1 Barb. 408; *Delafield* v. *Parish*, 25 Id. 38; *Stewart* v. *Lispenard*, 26 Wend. 308; *Trumbull* v. *Gibbons*, 22 N. J. L. 136; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Garrison* v. *Garrison*, 15 Id. 266; *Irish* v. *Smith*, 8 S. & R. 573 (11 Am. Dec. 648); *Grabill* v. *Barr*, 5 Penn. St. 441; *Brooke* v. *Townshend*, 7 Gill 10; *Dorsey* v. *Warfield*, 7 Md. 65; *Burton* v. *Scott*, 3 Rand. 399; *Heyward* v. *Hazard*, 1 Bay 335; *Potts* v. *House*, 6 Ga. 324; *Walker* v. *Walker*, 14 Id. 242; *Norris* v. *State*, 16 Ala. 776; *Powell* v. *State*, 25 Id. 21; *Kelly* v. *McGuire*, 15 Ark. 557; *State* v. *Gardiner*, Wright 392; *Baldwin* v. *State*, 12 Mo. 223; *Doe* v. *Reagan*, 5 Blackf. 217; *State* v. *Felter*, 25 Iowa 67; *White* v. *Bailey*, 10 Mich. 155; *Harrison* v. *Rowan*, 3 Wash. C. C. 580; *Dennis* v. *Weekes*, 51 Ga. 24; *Dove* v. *State*, 3 Heisk. 348; *Ins. Co.* v. *Rodel*, 5 Otto 233; *State* v. *Ketchey*, 70 N. C. 621; *O'Brien* v. *People*, 48 Barb. 275; *Deshon* v. *Merchants' Bank*, 8 Bosw. 461; *State* v. *Hayden*, 51 Vt. 296; *Fountain* v. *Brown*, 38 Ala. 72; *Gardiner* v. *Gardiner*, 34 N. Y. 155; *Choice* v. *State*, 31 Ga. 424; *Haut* v. *Haut*, 3 B. Mon. 577; *State* v. *Erb*, 74 Mo. 199; *Robinson* v. *Adams*, 62 Me. 369.

Evidence of opinion is admissible also on another principle, viz., that the matters testified to are matters of common and general knowledge. In *Barnes* v. *Ingalls*, 39 Ala. 193, the question arose as to whether a photograph had been well executed. The opinions of witnesses that certain photographs, executed for them by the same person, were well executed, were admitted, although the witnesses did not claim to be experts or to have any special knowledge on the subject. Said the court: "One of the facts to which they testified was that certain portraits painted for them by the plaintiff were faithful likenesses. A most important requisite of a good portrait is that it shall be a correct likeness of the original; and although only experts may be competent to decide whether it is well executed in other respects, the question whether a portrait is *like* the person for whom it was intended, is one which it requires no special skill in, or knowledge of the art of painting to determine. The immediate family of the person represented, or his most intimate friends, are indeed, as a general rule, the best judges as to whether the artist has succeeded in achieving a faithful likeness. To eyes, sharpened by constant and intimate association with the original, defects will be visible, and points of resemblance will appear which would escape the observation of the practical critics. We should think the painter had finished the likeness of a mother very indifferently if it did not bring home to her children traits of undefinable expression, which had escaped every eye but those of familiar affection. The fact of likeness or resemblance is one open to the observation of the senses, and no peculiar skill is requisite to qualify one to testify to it. Evidence on such a question stands upon the same footing as evidence of handwriting, the value of property, the identity of an individual and the like, and we think that the testimony of witnesses that pictures which the plaintiff, while in the defendant's employment, had executed for them were good likenesses, was competent evidence in the case."

So in a Wisconsin case (*Curtis* v. *Chicago, &c., R. R. Co.*, 18 Wis. 312), the question was as to the state of the weather

on a certain day, and whether it was cold enough to freeze vegetables contained in a building. The opinion of an ordinary witness was received. "It is true," said the court, "that, in general, witnesses are not allowed to give their opinions except upon questions of science, trade and some others of the same nature, and then they must be adepts. But upon a matter of such common experience as the state of the weather, whether cold or warm, and the effects likely to be produced by it upon fruit or vegetables when improperly exposed, we think the evidence savors more of facts than of conjecture, more of knowledge than of mere opinion. It is like the opinion of experienced witnesses upon questions of value, which is always allowable." And see *Ohio, &c., Railway Co.* v. *Irvin*, 27 Ill. 179; *Com.* v. *Timothy*, 8 Gray 480; *Greenfield* v. *People*, 85 N. Y. 75. So in *Stone* v. *Frost*, the opinions of ordinary witnesses were admitted on the question whether certain plants were dead when received, but were rejected on the question as to what killed them. Said the court: "The fact as to whether a root or other vegetable substance is dead or not is matter of such common observation and experience that it does not require an expert to testify in regard to it. The same may be said in regard to the question whether a dead grape root has any marketable or other value. On the question what had caused the killing of the roots, the evidence was all given by persons skilled in the matter, and was properly received."

JOHN D. LAWSON.

St. Louis, Mo.

In the Circuit Court of Cook County, Illinois.

KEHOE *v.* KEHOE.

The doctrine of the English courts as to superstitious uses has never been adopted in this country and is inconsistent with the religious liberty guaranteed by our constitutions.

A deed of personal property was made a few weeks prior to the donor's decease upon an oral trust that it should be devoted to the purpose of procuring masses to be said for his soul. Upon a bill filed by the trustee against the legal representatives of the donor to obtain the instructions of the court as to complainant's duty, *Held*, that the trust was valid and should be performed.

R. W. Clifford, for complainant.

A. Tripp, for respondent.

The opinion of the court was delivered by

TULEY, J.—Richard J. Kehoe files his bill to obtain the instruction of the court as to his duty as trustee in reference to certain funds now remaining in his possession.

John W. Kehoe, a few weeks prior to his decease, made a deed to complainant of certain personal property, upon oral directions